



## ENVIRONMENTAL PROTECTION AGENCY

[FRL- 9462-01-R3]

### **Delegation of Authority to the State of West Virginia to Implement and Enforce Additional or Revised National Emission Standards for Hazardous Air Pollutants Standards and New Source Performance Standards**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of delegation of authority.

**SUMMARY:** On December 7, 2021, the Environmental Protection Agency (EPA) sent the State of West Virginia (West Virginia) a letter acknowledging that West Virginia's delegation of authority to implement and enforce the National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS) had been updated, as provided for under previously approved delegation mechanisms. To inform regulated facilities and the public, EPA is making available a copy of EPA's letter to West Virginia through this notice.

**DATES:** On December 7, 2021, EPA sent West Virginia a letter acknowledging that West Virginia's delegation of authority to implement and enforce Federal NESHAPs and NSPS had been updated.

**ADDRESSES:** Copies of documents pertaining to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029. Copies of West Virginia's submittal are also available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

**FOR FURTHER INFORMATION CONTACT:** Yongtian He, Permits Branch (3AD10), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street,

Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2339. Mr. He can also be reached via electronic mail at He.Yongtian@epa.gov.

**SUPPLEMENTARY INFORMATION:** On May 4, 2021, West Virginia notified EPA that West Virginia had updated its incorporation by reference of Federal NESHAP and NSPS to include many such standards as found in Title 40 of the Code of Federal Regulations (CFR), parts 60, 61, and 63 as of June 1, 2020. On December 7, 2021, EPA sent West Virginia a letter acknowledging that effective June 1, 2021, West Virginia has the authority to implement and enforce the NESHAP and NSPS as specified by West Virginia in its notices to EPA, as provided for under previously approved automatic delegation mechanisms (49 FR 48692, 67 FR 15486, EPA delegation letters dated March 19, 2001 and January 8, 2002). All notifications, applications, reports, and other correspondence required pursuant to the delegated NESHAP and NSPS must be submitted to both EPA Region III and to the West Virginia Department of Environmental Protection, unless the delegated standard specifically provides that such submittals may be sent to EPA or a delegated State. In such cases, the submittals should be sent only to the West Virginia Department of Environmental Protection. A copy of EPA’s December 7, 2021 letter to West Virginia follows:

“ Ms. Laura M. Crowder, Director  
Division of Air Quality  
West Virginia Department of Environmental Protection  
601 57th Street, SE  
Charleston, West Virginia 25304

Via email at [laura.m.crowder@wv.gov](mailto:laura.m.crowder@wv.gov)

Dear Ms. Crowder:

This letter acknowledges your letter dated May 4, 2021, in which the West Virginia Department of Environmental Protection (WVDEP) Division of Air Quality (DAQ) informed the United States Environmental Protection Agency (EPA) that West Virginia had updated its incorporation by reference of federal National Emissions Standards for Hazardous Air Pollutants (NESHAPs) and New Source Performance Standards (NSPSs) to include many such standards as

found in 40 CFR parts 60, 61, and 63 as of June 1, 2020. WVDEP DAQ noted in the letter that it understood it was automatically delegated the authority to implement these standards. WVDEP DAQ stated its intent to enforce the standards in conformance with the terms of EPA's previous delegations of authority pursuant to the EPA final rules published at 49 FR 48692 and 67 FR 15486, and EPA delegation letters.

In two rulemakings, 49 FR 48692 (December 14, 1984) and 67 FR 15486 (April 2, 2002), EPA established the basis for delegation to West Virginia of specified federal standards at 40 CFR Parts 60, 61 and 63. Subsequently, in a letter dated March 19, 2001 (enclosed), to WVDEP Director Michael Callaghan, EPA delegated to the State of West Virginia the authority to implement and enforce various federal NESHAPs found in 40 CFR Part 63. In another letter to Director Callaghan dated January 8, 2002 (enclosed), EPA delegated to the State of West Virginia the authority to implement and enforce various federal NESHAPs found in 40 CFR Part 61 and NSPSs found in 40 CFR Part 60). In those letters, EPA also established that future Part 60, Part 61 and Part 63 standards would be automatically delegated to West Virginia subject to the conditions set forth in those letters. Those rulemakings and letters continue to control the conditions of delegation of future standards and their terms should be consulted for the specific conditions that apply to each regulatory program. However, in general terms, for automatic delegation to take effect, the letters establish conditions that can be paraphrased as requiring: legal adoption the standards; restrictions on the kinds of wording changes West Virginia may make to the federal standards when adopting them; and specific notification from West Virginia to EPA when a standard has been adopted.

WVDEP DAQ provided copies of the revised West Virginia Legislative Rules which specify the NESHAP and NSPS regulations West Virginia has adopted by reference. These revised Legislative Rules are entitled 45 CSR 34 – "Emission Standards for Hazardous Air Pollutants," and 45 CSR 16 – "Standards of Performance for New Stationary Sources." These revised Rules have an effective date of June 1, 2021. EPA has reviewed the Revised rules and

determined that they meet the conditions for automatic delegation as established by EPA in its prior letters and rulemakings.

Accordingly, EPA acknowledges that West Virginia now has the authority, as provided for under the terms of EPA's previous delegation actions, to implement and enforce the NESHAP and NSPS standards which West Virginia adopted by reference in West Virginia's revised Legislative Rules 45 CSR 34 and 45 CSR 16, effective on June 1, 2021.

Please note that on December 19, 2008 in *Sierra Club vs. EPA* (551 F.3<sup>rd</sup> 1019, D.C. Circuit 2008), the United States Court of Appeals for the District of Columbia Circuit vacated certain provisions of the General Provisions of 40 CFR part 63 relating to exemptions for startup, shutdown, and malfunction (SSM). On October 16, 2009, the Court issued the mandate vacating these SSM exemption provisions, which are found at 40 CFR Part 63, 63.6(f)(1), and (h)(1).

Accordingly, EPA no longer allows sources to use the SSM exemption as provided for in the vacated provisions at 40 CFR 63.6(f)(1), and (h)(1), even though EPA has not yet formally removed the SSM exemption provisions from the General Provisions of 40 CFR part 63. Because West Virginia incorporated 40 CFR part 63 by reference, West Virginia should also no longer allow sources to use the former SSM exemption from the General Provisions of 40 CFR part 63 due to the Court's ruling in *Sierra Club vs. EPA*.

If you have any questions, please contact me or Ms. Mary Cate Opila, Chief, Permits Branch, at 215-814-2041.

Sincerely,

Cristina Fernández, Director  
Air and Radiation Division"

Enclosures

cc: Renu Chakrabarty (via email at [renu.m.chakrabarty@wv.gov](mailto:renu.m.chakrabarty@wv.gov))  
Mike Egnor (via email at [michael.egnor@wv.gov](mailto:michael.egnor@wv.gov))

This notice acknowledges the updates of West Virginia's delegation of authority to implement and enforce NESHAP and NSPS.

Dated January 26, 2022.

Cristina Fernández, Director,  
Air and Radiation Division,  
Region III.

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